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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. ~~6~~ 105

CHARLES E. WILLIAMS, *Petitioner,*

v.

HOWARD JOHNSON'S, INC. OF WASHINGTON,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

CHARLES E. WILLIAMS,
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PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Charles E. Williams, petitioner, prays that a writ of certiorari issue to review a final order entered by the United States Court of Appeals for the Fourth Circuit February 4, 1965.

OPINIONS BELOW

The initial decision for respondent (R., II, 192),[1] 210 F. Supp. 295, was printed for the court below in the appendix to plaintiff's brief (Pl. CA App. VII). The decision vacating the judgment and remanding the cause (R., I, 2), is reported at 323 F. 2d 102. On remand, the case was again dismissed (R., I, 52) (Pl. CA App. XI), and the decision affirming dismissal (R., IX, 12), F. 2d , appears in the appendix, *infra*.

JURISDICTION

The judgment sought to be reviewed was entered February 4, 1965. (R., IX, 12, 21.) A timely motion to amend the same, primarily, to establish its absolute verity, was filed February 25, 1965, (R., IX, 23) and denied pro forma as of March 8, 1965. (R., IX, 77.) The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 2101(c), 2106, and 42 U.S.C. § 1984.

STATUTES INVOLVED

The statutes involved, 42 U.S.C. §§ 1983, 1985(3), 1988 and the equal accommodations sections of the Civil Rights Act of 1875, are printed in the appendix, *infra*.

QUESTIONS PRESENTED

(Statutory Construction)

Equal Protection of Laws:

1. Whether respondent (authorized by charter and the corporation laws of Delaware and Virginia to operate restaurants in interstate and foreign commerce the same as natural persons) acted beyond the scope

[1] The transcript has been prepared and certified in 9 vols.

of vested authority and, nevertheless, under color of the charter[2] and corporation laws when it discriminated against petitioner solely on racial grounds.

2. Whether the failure or neglect of the Commonwealth's attorney to investigate petitioner's complaint to him of being racially excluded from restaurants operated in his jurisdiction by competitor restaurant corporations (to determine whether they unlawfully conspired to refuse business dealings with Negroes or otherwise acted beyond the scope of authority vested by the state) constituted an official sanction of, or acquiescence in, or giving color to, such discrimination.

Due Process of Law:

3. Whether petitioner was denied the right to fully and fairly prove his claim (of the denial of equal protection under color of law or his alternative claim for federal protection of the right of due process of law by enforcement of state and common law remedies) because of the judicial misapprehension of: (a) the substantial inconvenience limitation of 28 U.S.C. § 1404(a); (b) the quantum of proof required to establish a *prima facie* case under 42 U.S.C. §§ 1983, 1985(3); (c) the purpose of 42 U.S.C. § 1988 to secure due process by incorporating state remedies in the civil rights acts; and (d) the rights secured by the Federal Rules of Civil Procedure.

4. If, on this record, recovery may be had under 42 U.S.C. §§ 1983, 1985(3), 1988, then, are the equal accommodation sections of the Civil Rights Act of

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[2] The corporate charter, irrespective of whether incorporation was under a special act or general law, constitutes state legislation. FLETCHER, PRIVATE CORPORATIONS § 3640 (1964 rev. vol.).

1875 (voided *only* in cases of *purely* private action without the sanction of law in both state[3] and commerce[4] jurisdictions without reference to the Congressional purpose to supplement existing federal and state remedies) presently constitutional as supplementary legislation? And, if so, does the term "inns" embrace the "House" (tavern, inn, alehouse, or victualing house) within the statute creating the common law right of action? (See Note 8, *infra.*)

5. Whether, irrespective of the outcome of the case, petitioner may, by separate or supplemental claim, recover the full costs incurred, or a reasonable portion thereof, in litigating his claim in the transferee forum where it may properly be inferred from the record that the transferor court was induced by misrepresentations to relinquish jurisdiction and transfer the case to the forum of respondent's choice; and, if not, whether costs may be taxed against respondent for its refusal to make a full disclosure of relevant facts within its peculiar knowledge during discovery and for petitioner's successful resistance of respondent's efforts to enforce a sanction erroneously imposed for

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[3] *Civil Rights Cases,* 109 U.S. 3 (1883).

[4] In view of the holding in the *Civil Rights Cases,* the Act was invalidated in its entirety, as applied to private discrimination unsupported by state action, since Congress did not intend it to have a separable application to purely private discrimination in the commerce jurisdiction. *Butts* v. *Merchants & Miners Transp. Co.,* 230 U.S. 126 (1913).

The contention for the present vitality of the Act to supplement federal and state civil rights remedies has considerable merit since, under the rules of construction, the invalidating decisions are limited to the precise facts to which applied. The question is ripe for decision. See Petition for Certiorari, *Williams* v. *Hot Shoppes, Inc.,* 370 U.S. 925 (1962); and Francis D. Wormuth, The Present Status of the Civil Rights Act of 1875, 6 UTAH L. REV. 153 (1958).

merely seeking leave to conform the pleadings and evidence under Rule 15(b). (R., I, 45-48, 55-58, 59; and R., IV, 46-A.)

STATEMENT

This application represents the culmination of an extended litigation arising out of the racial exclusion of an invitee November 5, 1959, from a public restaurant operated by a business corporation in Alexandria, Va.

The Parties

Petitioner was and is still a citizen resident in the District of Columbia. The respondent, a Delaware corporation,[5] then had and still maintains executive offices in the District of Columbia from which HOWARD JOHNSON'S facilities are operated in Washington, D. C., Maryland, and Virginia. During 1959, Negroes were accommodated in all such facilities except those located in Virginia.

Background

Petitioner, a Negro, who, like others of his class, had been subjected to persistent, invidious, racial discrimination by interstate corporations operating restaurants on the interstate highway system of the United States, set out in 1958 to prove that such discrimination constituted a civil injury redressable under the civil rights acts. The court below affirmed

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[5] Respondent was the wholly owned subsidiary of the Howard Johnson Co., a Maryland corporation, whose consolidated balance sheet disclosed assets and liabilities, at the end of 1963, of $49,335,308; net sales of $124,315,532, and net income of $5,391,818. (Admissions 2 & 6; R., I, 10, 12, 35) and MOODY'S INDUSTRIAL MANUAL, 976 (1964).

dismissal of the first such suit.[6] Its holding became the first federal decision insulating the corporate restaurant keeper against liability for an acknowledged civil injury. (See note 19, *infra.*) The decision has since been relied on, cited, harmonized, or referred to in the reported state and federal decisions (including the dissent, 365 U.S. at 729) at least 38 times.

Petitioner, entirely convinced of the merit of his position, instituted suits in the District of Columbia against Hot Shoppes, Inc., a competitor of the respondent, in 1959, and against the respondent in 1960. Meanwhile, nationwide agitation resulted in several court decisions and the federal Public Accommodations Law of 1964 invalidating various forms of state imposed segregation in semi-publicly and privately operated eating facilities.

The segregation laws had been regarded for nearly a half century as having modified the common law. Thus, with the elimination of such laws, petitioner began to emphasize the applicability of state and common law redress under 42 U.S.C. § 1988. However, the courts below, apparently, irritated by his persistence in litigating the claim, flatly denied the benefit of the statute and Rule 15(b) of the Federal Rules.

The Gravamen

Petitioner felt aggrieved by the state laws under which the respondent had been created, domesticated, licensed to deal with the public, extensively regulated by law in the public interest, and then either *permitted* or *required* by Virginia officials to discriminate against the public on racial grounds.

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[6] *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845 (1959).

In addition, it appeared that the common law action of case for the arbitrary revocation of the tavern, alehouse, or victualing house keeper's invitation held out to all[7] (distinguishable from redress for breach of the strict common law innkeeper's obligation) was also available under the Virginia statutes.[8] Hence, peti-

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[7] *Six Carpenters Case*, 8 Co. Rep. 290, 77 Eng. Rep. 695 (K.B. 1610). "If there is no misconduct or impropriety * * * the landlord * * * of an * * * alehouse * * * could not revoke the invitation held out to all, and could not without sufficient reason eject him (the invitee) from it." *Pigeon* v. *Legge*, 21 J. P. 743, 744, 5 W. R. 649, 650 (Exch. Ch. 1857). But "it is not every noise, nor every circumstance alarming to a very timid person, which will justify" exclusion from a public house, tavern, or victualing house. See *Webster* v. *Watts*, 11 Q. B. 311, 324, 116 Eng. Rep. 492, 498 (Q.B. 1847).

[8] VA. CODE ANN. § 1-10 (1950) (1964 Cum. Supp.) provides: "The common law of England, in so far as it is not repugnant to the principles of the Bill of Rights and Constitution of this State, shall continue in force within the same, and be the rule of decision, except as altered by the General Assembly."

The Virginia decisions holding that only the legislature may alter the common law are set forth in the Plaintiff's Trial Brief, pp. 4-5 (R., I, 39).

VA. CODE ANN. § 1-11 (1950) provides: "The right and benefit of all writs, remedial and judicial, given by any statute or act of Parliament, made in aid of the common law prior to the fourth year of the reign of James the First, of a general nature, not local to England, shall still be saved, in so far as the same are consistent with the Bill of Rights and Constitution of this State and Acts of Assembly."

Accordingly, the STATUTE OF WESTMINISTER THE SECOND, 13 Edw. 1, c. 24 (1285), provides: "In cases whereas a Writ is granted out of the Chancery of the Fact of another, the Plaintiffs from henceforth shall not depart from the King's Court without Remedy, because the Land is transferred from one to another. (2) And in the Register of the Chancery there is no special Writ found in this Case, as of a House, a Wall, a Market, but the Writ is granted against him that levied the Nusance. (3) *And if a House, Wall, or*

tioner felt aggrieved by the *decisions* which were generally conceded as having abrogated the right of recovery for breach of the invitor's implied undertaking.[9]

Thus, this action for damages and civil penalty was instituted in the District of Columbia November 4, 1960. Jurisdiction was invoked under 28 U.S.C. §§ 1343, 1355. (R., II, 1.)

The Pleadings & Transfer of Case

The simple allegation of racial discrimination under color of the segregation statute had been held insufficient to permit proof of the enforcement of such segregation in restaurants by state officers.[10] Therefore, the original complaint in this action was drawn with

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such like be aliened to another, the Writ shall not be denied, but from henceforth, where in one Case a Writ is granted, in like Case, when like Remedy falleth, the Writ shall be made as hath been used before:

"[(4) Questus est nobis A. quod D. injuste, &c. Levavit domum, murum, mercatum, & alia quae sunt ad nocumentum, &c. (A has complained to us that D has unjustly aliened a house, wall, market, and other things which is to his injury, etc.)]

"(5) And if such Things levied be aliened from one to another, the Writ shall be thus:

"[Questus est nobis A. quod B. & C. levaverunt, &c. (A has complained to us that B and C have aliened, etc.)]"

And c. 50 provides that "No man shall depart from the King's Court without Remedy." (Emphasis supplied.)

[9] *Alpaugh* v. *Wolverton*, 184 Va. 943, 36 S.E 2d 906 (1946); and *Randolph* v. *Commonwealth*, 202 Va. 661, 119 S.E. 2d 817 (1961), followed by the courts below even though the judgment had been vacated and cause remanded by this Court, 374 U.S. 97 (1963).

[10] *Williams* v. *Hot Shoppes, Inc.*, 110 U.S. App. D.C. 358, 293 F. 2d 835 (1961).

particularity to reflect the substance of the claim at the outset. (R., II, 1-9.)

But the respondent, representing to the court that it did not understand such terms as "under color of state law, custom, or usage," or "license," or "fraud," or "public accommodations," still insisted upon "a more definite statement." (R., II, 22-25.) Petitioner, though doubting the good faith of the objection, nevertheless, consented to amend the complaint so as to eliminate the possibility of an issue under Rule 8(a) and facilitate the proceedings. (R., II, 42-45; Pl. Affidavit, 1-6, R., IX, 36-41.)

Thereafter, the action was transferred to the Eastern District of Virginia, a court with one judge sitting in two divisions. (R., II, 73-75.) The transfer was induced by representations to the transferor court (a court with 18 judges and a staff of pretrial examiners) based on the suppression of relevant facts bearing upon its ability to make a bona fide defense in the District of Columbia.[11] (Motion for Change of Venue, R., II, 16-21, 51-53; Pl. Affidavit, 6-14, R., IX, 41-49.)

Toward the end of pretrial discovery, the complaint was again amended with the *written* consent of the respondent's attorneys, *prior* to the filing of the answer,[12] in order to reflect the "discovered" facts. (R., II, 154-156.)

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[11] "Concealment of the truth * * * is, in fact, *prima facie* evidence of fraudulent intention." *The Cheshire*, 3 Wall. (70 U.S.) 231, 234 (1866). "A statement of a half truth is as much a misrepresentation as if the facts stated were untrue." *Equitable Life Ins. Co.* v. *Halsey, Stuart & Co.*, 312 U.S. 410, 426 (1941).

[12] The opinion of the court below gives the erroneous impression that the complaint was amended three times, instead of twice, due to pleading ineptitude; that the Rule 15(b) contention was advanced on appeal for the first time in an attempt to sustain a fourth amendment; and that petitioner conducted the litigation improperly.

Undisputed Evidentiary Facts

Petitioner, a Negro, sought to be served as a customer in the respondent's restaurant in the City of Alexandria, Va., during regular business hours November 5, 1959. Although clean and orderly, his application was refused on racial grounds. (Pl. Ex. 8, p. 49; and Tr., R., V, 5-6, 18-23.)

By charter, the respondent was authorized "to carry on" the restaurant business, "as fully and to the same extent as natural persons might or could do," in interstate commerce; and the respondent was so engaged in 1959. (Certified Copy of Charter, and Admission 1, R., II, 107-108, 139; and Tr., R., V, 57.)

The Alexandria restaurant has been open to the general public under state licenses, since 1941 for the purpose of retailing food, wine, ale, and beer primarily for consumption on the premises. And it has been continuously held out to the general public for that purpose without notice that Negroes would not be accepted as customers. (Ans. to Interrog. 3, R., II, 96; Admission 4, R., VII, 17; and Tr., R., V, 7-8, 65-66, 67.)

During 1959, the respondent regarded anyone, including a Negro, who applied for restaurant service as a prospective customer. And Negroes were accepted as customers at all Howard Johnson's facilities in the metropolitan area of Washington, D. C. except those located in Virginia. Hence, petitioner, though not personally distasteful or otherwise objectionable to respondent, having been accepted by respondent as a customer at facilities outside of Virginia, was, nevertheless, excluded from the Alexandria restaurant despite the fact that the arbitrary exclusion of Negroes therefrom was not deemed necessary to the operation

of the business. (Admission 22, R., I, 14, 36; Pl. Ex. 8, pp. 47, 49, 53, 54; and Tr., R., V, 66-68.)

In this connection, the District Court refused to compel disclosure of the precise reason for such discrimination (see Interrog. 70-74, Pl. CA App. IV) and would not permit examination into the matter at the trial. (Tr., R., V, 70-74.)

The petitioner complained to the Commonwealth's attorney for the City of Alexandria concerning his exclusion on November 5, 1959, from two restaurants in his jurisdiction operated by competitor interstate corporations. But the latter took no action. (Tr., R., V, 51-52.)

The Commonwealth's attorney regarded restaurants as within the Virginia segregation statute and so advised those who made inquiries during 1959. (Tr., R., V, 42.) And the respondent was aware of his attitude. [Interrog. 12(b), 12(d) & Ans., R., II, 80, 97.]

The District Court had been of the same opinion.[13] But in 1960, the Virginia Attorney General announced that, in his opinion, the segregation statute did not apply to restaurants,[14] and the respondent thereafter desegregated (admitted Negroes to) the Alexandria restaurant. (Tr., R., V, 84-88.)

Plaintiff testified relative to the injury sustained and the costs incurred in the effort to vindicate federal rights. (Tr., R., V, 8, 9-15, 33.)

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[13] *Nash* v. *Air Terminal Services*, 85 F. Supp. 545, 548 (1949).

[14] VA. ATT'Y GEN. OPS. 278-281 (1961); (R., V, 37-38.)

Contentions Advanced Below

First, it was contended that the foregoing evidence established a *prima facie* case of civil injury caused by either a usurpation of corporate authority or the action or inaction of a state official. Hence, it was urged, the burden was on the respondent to rebut the *prima facie* case with precise evidence of the inducement for the arbitrary discrimination against Negroes in Virginia during 1959.

The only testimony offered by respondent was the deposition of a dead employee who had never been an officer. This, of course, was not binding on the corporation.[15] The "best evidence" rule required the respondent to produce the best evidence (testimony of an officer) of the disputed fact, *viz.*, whether the state custom of racial segregation induced its discrimination against petitioner. Thus, respondent's production of weak evidence when strong evidence was available leads to the conclusion that such evidence would have been adverse.

Only the respondent actually knew whether the state or its agents induced its decision to discriminate against Negroes during 1959. Therefore, its silence became evidence in the petitioner's favor.[16]

But petitioner's argument that proper application of the "best evidence" and "negative evidence" rules

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[15] Rule 26(d)(2), FED. R. CIV. P.; *Williams* v. *Howard Johnson's, Inc. of Washington*, 323 F. 2d 102, 105 (4th Cir. 1963).

[16] *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1953). "The ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary." *Campbell* v. *United States*, 365 U.S. 85, 96 (1961); *Commercial Molasses Corp.* v. *N. Y. Tank Barge Corp.*, 314 U.S. 104, 111 (1941).

to the respondent relieved petitioner from making further proof of state action was flatly rejected.[17] (Pl. Trial Br. 15-17; R., I, 39.)

Alternatively, it was argued that 42 U.S.C. § 1988 incorporates: (a) the state and common law remedies[18] (notes 7, 8, *supra*); (b) the VIRGINIA BILL OF RIGHTS, § 1, which prohibits enforcement of any oppressive "compact" (here, the corporate charter to which the state is a party) which tends to "deprive or divest" citizens of "liberty" and the pursuit of "happiness" and (c) VA. CODE ANN. § 8-858 (1950) which authorizes anyone to apply for a writ to relieve against a corporate usurpation where the Commonwealth's attorney fails to do so.

But the court below, though fully aware of "the *substantial inconvenience and embarrassment* to which persons of the Negro race are subject *in the denial* to them *of the right* to be served in public restaurants,"[19] preferred to believe that the wrong complained of in

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[17] Prior Fourth Circuit holdings involving the best or negative evidence rule were disregarded, *e.g.: Southern Cross S.S. Co.* v. *Firipis,* 285 F. 2d 651, *cert. denied,* 365 U.S. 869 (1961); *O'Dwyer* v. *Commissioner,* 266 F. 2d 575, *cert. denied,* 361 U.S. 862 (1959); *Snead* v. *United States,* 217 F. 2d 912, *cert. denied,* 348 U.S. 971 (1955); *Pacific-Atlantic S.S. Co.* v. *United States,* 175 F. 2d 632, *cert. denied,* 338 U.S. 868 (1949).

[18] The evidence supports the inference that the Alexandria restaurant was held out or advertised to the public in bad faith. At common law, "damages without fraud give no cause of action; but where these two do meet together, there an action lieth." *Angle* v. *Chicago, St. P., M. & O. Ry. Co.,* 151 U.S. 1, 10 (1894).

[19] Note 6, *supra,* 268 F. 2d at 846. (Emphasis supplied.)

this action was without a remedy in Virginia.[20] It thus rejected the argument for proceeding under 42 U.S.C. § 1988 despite the decisions of this Court permitting modification but prohibiting impairment of common law remedies.[21]

Finally, it was contended that even if the individual restaurateur is thought to have the right to pick and choose customers on a racial basis, without liability, the corporation would have no such right. It does not possess natural rights (of association) or capacities.[22]

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[20] "There is no such thing as a vested right to do wrong." *Freeborn* v. *Smith,* 2 Wall. (69 U.S.) 160, 175 (1865); *Randall* v. *Kreiger,* 23 Wall. (90 U.S.) 137, 149 (1875). This applies with even more force to a corporation since it is state-created. Whenever there is a breach of an agreement, express or implied, the law infers some damage irrespective of the amount or actuality of damage. 15 AM. JUR., *Damages,* § 3 (1938).

[21] "A right of action to recover damages for an injury is property." And the state cannot "pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged." *Angle* v. *Chicago, St. P., M. & O. Ry. Co.,* 151 U.S. 1, 19 (1894). Where the right of action is statutory, the right changes with the statutes. But where "it springs from contract or the principles of common law" the right stands upon the footing of every other *lawful* contract and cannot be impaired by the state. *Pritchard* v. *Norton,* 106 U.S. 124, 132 (1883); *Poindexter* v. *Greenhow,* 114 U.S. 270, 300 (1885).

Finally, the act of "refusing the accommodation" may be "justly regarded * * * as inflicting an ordinary civil injury properly cognizable by the laws of the state, and presumably subject to redress by those laws until the contrary appears." *Civil Rights Cases,* 109 U.S. 3, 24 (1883). Of course, "the federal remedy is supplementary to the state remedy, and the latter need not first be sought and refused before the federal one is invoked." *Monroe* v. *Pape,* 365 U.S. 167, 183 (1961).

[22] FLETCHER, PRIVATE CORPORATIONS, § 2476 (1950), (1963 Cum. Supp.).

Thus, the presumption that it does cannot be indulged because "no state may endow its corporate creatures with [such] power."[23] Consequently, the respondent is liable for the injury to petitioner.[24]

This contention was disregarded and the benefit of Rule 15(b) denied.

Procedural Matters

1. The case was transferred to the District Court below July 20, 1961, and on February 9, 1962, it was set for trial June 19, 1962. Petitioner instituted discovery proceedings February 21, 1962. (R., II, 78.) The order resolving objections was entered June 4, (R., II, 149) and discovery thereafter completed June 8, 1962. (R., II, 162-167.) Petitioner then moved for summary judgment (Pl. CA App. VI) June 15, 1962, relying on the inability to complete discovery as reasonable cause for noncompliance with the 10-day notice requirement of Rule 56(c). (Pl. Affidavit, R., II, 207.) But jurisdiction under Rule 56 was refused.

2. Petitioner attempted, in the interest of orderly procedure, to have the District Court determine which facts had been admitted under Rule 36 and which had been denied in good faith. But evasive responses were allowed. The Court of Appeals held that some of them were "utterly evasive and frivolous," 323 F. 2d at 105, but declined jurisdiction to determine

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[23] See *Anderson* v. *Abbott*, 321 U.S. 349, 365 (1944).

[24] "It is the unlawful use of power • • • which gives rise to the jurisdiction of the court to afford relief, not the particular form such abuse of power takes." *Dillard* v. *C. & O. Ry. Co.*, 199 F. 2d 948, 951 (4th Cir. 1952).

whether, under Rule 37, petitioner was entitled to recover the costs incurred in proving such matters.[25]

3. Petitioner attempted to invoke the pretrial and the summary judgment fact finding function under Rule 16 and Rule 56(d), respectively,[26] but without success. He was likewise unsuccessful in having additional preliminary findings entered under Rules 41(b) and 52(a) to insure "an evaluation based * * * on a balanced order of facts *exactly* and *fairly* stated."[27]

4. The decision sought to be reviewed contains numerous untrue, prejudicial factual statements which are unsupported by the record. The errors were enumerated for the court below in petitioner's Motion to Amend Mandate and supporting affidavit filed February 25, 1965.[28] (R., IX, 23.)

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[25] The respondent's objections to discovery, refusal to respond to requests for admissions, and partial answers given to interrogatories caused petitioner to incur the costs of annual leave from Government employment and travel between Washington, D. C. and Richmond, Va. for the adjudication of general rather than specific objections. In addition, respondent refused to admit under Rule 36, or otherwise stipulate in order to avoid the necessity of formal proof, those facts admitted under Rule 33 as well as the extensive regulation and visitorial rights of the state.

[26] HARRY D. NIMS, PRE-TRIAL, 140-141 (1950).

[27] *Rochin* v. *California*, 342 U.S. 165, 172 (1952). (Emphasis supplied.)

[28] The Motion states its purpose to be: "(1) to eliminate inadvertent technical inaccuracies and thus establish the absolute verity of the factual statement in the opinion; (2) to dispose of procedural due process issues, properly raised by the record, bearing upon the trial of the matter and the proper allocation and taxation of costs; (3) to supplement the decree and secure or maintain uniformity or continuity of the Fourth Circuit's decisions; and (4) to clarify an apparently confused record and avoid, if possible, further review of purely procedural points."

The mandate (certified copy of the decision) was scheduled to go down March 9, 1965. Therefore, a Motion to Stay the Mandate until disposition of the motion to amend was filed February 26, 1965. Neither motion was defended despite the charge of fraud in the procurement of the judgment by effecting transfer of the action in bad faith from the jurisdiction where both parties reside or do business.

On March 5, 1965, the Clerk advised that action on the motions before March 9, appeared unlikely and suggested that a stay would be granted for the purpose of an application for a writ of certiorari. Hence, such a motion was filed March 8, and granted March 9, 1965. (R., IX, 75, 80.)

Jurisdiction under Rules 60(b) and 75(h) to modify the decree or otherwise clarify the record, "in the interest of fairness,"[29] was refused. And on March 18, 1965, petitioner was notified that a perfunctory order denying the motion to amend had been entered as of March 8, 1965. (R., IX, 77.)

REASONS FOR ALLOWANCE OF THE WRIT

I. A Substantial Departure From Accepted Procedure Was Sanctioned Below

A substantial constitutional question is provoked by proceedings in which a litigant is denied the benefit of the Federal Rules of Civil Procedure [Rules 1, 15(b), 16, 26, 33, 36, 37, 41(b), 43(a), 52(a), 56(d), 60(b), 75(h)] as well as the presumptions and inferences to which he is lawfully entitled.

The petitioner sought merely to vindicate federal rights in accordance with the Federal Rules. And while there is no evidence that he ever employed improper tactics at any stage in the prosecution of the

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[29] *Cahill* v. *N. Y., N.H. & H. RR. Co.*, 351 U.S. 183 (1956).

claim his motives were questioned and conduct of the litigation unfairly criticized.[30] (Tr., R., V, 27-33; appendix, p. 8a, *infra.*)

The substantive issues raised are of particular importance to 20 million nonwhite citizens and residents who have long hoped for the final vindication of the right of recovery against the impersonal creatures of the state for injury caused by their invidious racial restrictions.

The right of a litigant to be heard is one of the fundamental rights of due process. Thus, a denial of the right calls for a reversal. "Tested by the totality of the facts," the judgments below appear to be so clearly erroneous and shockingly wrong as to present a substantial due process question.[31]

With the high cost of adjudication, generally, any procedure which nullifies the opportunity to fully and fairly vindicate substantive rights in the federal courts raises a question of tremendously special import and requires exercise by this Court of its supervisory power.

> "When such a misapprehension of the law has led both courts below to adjudicate rights without

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[30] The general attitude of the courts below raises a serious question of whether the individual citizen still has a meaningful right to invoke the civil rights remedy and be heard; or whether he must, in order to present a respectable claim and avoid the horrendous cost of litigation, submit his case to a civil rights organization for prosecution in the event it determines the claim has merit.

[31] See *Reynolds* v. *Cochran*, 365 U.S. 525 (1961); *Speiser* v. *Randall*, 357 U.S. 513 (1958); *Wolfle* v. *United States*, 291 U.S. 7 (1934); *Funk* v. *United States*, 290 U.S. 371 (1933); *Horey* v. *Elliott*, 167 U.S. 409 (1897); and see *Garner* v. *Louisiana*, 368 U.S. 157, 163 (1961).

considering essential facts in light of the controlling law, this Court will vacate the judgments and remand the case to the District Court for further proceedings consistent with the principles laid down in this Court's opinion."[32]

II. The Judgment Below Creates a Conflict in the Circuits

The rejection of the contention that 42 U.S.C. § 1988 incorporates state remedies is in direct conflict with the holdings of other courts incorporating state wrongful death and survival statutes in the federal civil rights remedy.[33] The issue thus raised is unique, important, and timely and should be resolved by the Court.

III. The Decision Is in Conflict With the Decisions of This Court

The decision below "seem[s] to be out of line with the authorities"[34] in the following respects: Full disclosure of the facts was not required during discovery; examination into corporate intent was not permitted during the trial; and the benefit of the "best evidence rule" was denied. (Notes 16, 25, 26, *supra.*) In addition, relief from fraud was withheld (notes 11, 18); common law redress was held to have been abrogated by state decisions (notes 9, 21); and the mandate of Rule 15(b), FED. R. CIV. P., was misconstrued.[35]

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[32] *Maggio* v. *Zeitz*, 333 U.S. 56, 77 (1948).

[33] *Pritchard* v. *Smith*, 289 F. 2d 153 (8th Cir. 1961); *Brazier* v. *Cherry*, 293 F. 2d 401 (5th Cir. 1961).

[34] *Braen* v. *Pfeifer Oil Transp. Co.*, 361 U.S. 129, 130 (1959).

[35] *Foman* v. *Davis*, 371 U.S. 178 (1962).

IV. The Decision Below Creates Intracircuit Conflict

The court below refused to follow or apply principles of prior holdings, to-wit, decisions: (1) which require a party to meet the substance of a request for admission under Rule 36;[36] (2) which apply the "best evidence" or "negative evidence" rule (note 17); (3) which enforce the duty of the invitor to the invitee;[37] and (4) which hold the suppression of relevant facts as fraudulent where, by reason of such suppression, a party (here, the transferor court) was influenced to act.[38] This Court has taken jurisdiction to secure uniformity of decision within the circuit.[39]

V. This Case Presents Extremely Important Issues of Statutory Construction

The insistence upon clear and convincing proof of direct state action to sustain recovery under 42 U.S.C. §§ 1983, 1985(3) constitutes an unwarranted construction of the civil rights acts by the courts below.[40] This and the remaining issues of statutory construction presented by this petition are of extraordinary importance. See note 4, *supra*.

Thus, an early determination of the questions presented and the controlling principles in cases arising

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[36] *Southern Ry. Co.* v. *Crosby*, 201 F. 2d 878, 880 (1953).

[37] See *Norfolk Tidewater Terminals* v. *Wood Towing Corp.*, 94 F. 2d 164, 166 (1938); and *Robey* v. *Keller*, 114 F. 2d 790, 794 (1940).

[38] *Homelite* v. *Trywilk Realty Co.*, 272 F. 2d 688, 691 (1959).

[39] *Cf. John Hancock Mutual Life Ins. Co.* v. *Bartels*, 308 U.S. 180, 181 (1939); *Maggio* v. *Zeitz*, 333 U.S. 56, 59-60 (1948); *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950).

[40] *Cf. Michalic* v. *Cleveland Tankers, Inc.*, 364 U.S. 325 (1960).

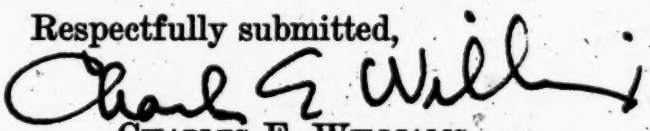
under the civil rights acts where the wrongdoer is a corporation is highly desirable.

These issues have been awaiting the perspective of time. And, despite the recent lunch counter "sit-in" adjudications,[41] they remain unsettled and ripe for decision.

CONCLUSION

For the foregoing reasons, the petitioner prays the Court to grant the writ.

Respectfully submitted,



CHARLES E. WILLIAMS,
Petitioner, Pro se
1329 Shepherd Street, N.W.
Washington, D. C. 20011

May 3, 1965

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[41] *E.g.*, *Lombard* v. *Louisiana*, 373 U.S. 267 (1963); *Peterson* v. *City of Greenville*, 373 U.S. 244 (1963); *Robinson* v. *Florida*, 378 U.S. 153 (1964); and the *Virginia* cases, *viz.*, *Randolph*, *Henry*, *Thompson*, and *Wood*, 374 U.S. 97, 98, 99, 100 (1963), and the *Green* and *Harris* decisions, 378 U.S. 550, 552 (1964).

APPENDIX

APPENDIX

STATUTES INVOLVED

(Revised Statutes of the United States, 1878; Title 42 of the U.S. Code, 1958 ed.)

Rev. Stat. § 1979, 42 U.S.C. § 1983, provides:

> Every person who, *under color of any statute,* ordinance, regulation, *custom or usage of any State* or Territory, *subjects,* or causes to be subjected, *any citizen* of the United States or other person within the jurisdiction thereof *to the deprivation of any rights,* privileges, or immunities *secured by the Constitution and laws, shall be liable to the party injured in an action at law,* suit in equity, or other proper proceeding for redress. (Emphasis supplied).

Rev. Stat. § 1980, 42 U.S.C. § 1985(3), provides:

> *If two or more persons in any State* or Territory *conspire* or go in disguise on the highway or on the premises of another, *for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;* or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; *in any case of conspiracy set forth in this section, if one or more persons engaged*

therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. (Emphasis supplied.)

Rev. Stat. § 722, 42 U.S.C. § 1988, provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal case is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and if it is of a criminal nature, in the infliction of punishment on the party found guilty.

The equal accommodations sections of the Act of March 1, 1875, c. 114, 18 Stat. 336, provide:

> [Sec. 1] That *all persons* within the jurisdiction of the United States *shall be entitled to the full and equal enjoyment of the accommodations,* advantages, facilities, and privileges *of inns,* public conveyances on land or water, theatres, *and other places of*

public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Sec. 2. That *any person who shall violate the foregoing section by denying to any citizen, except for reasons by law applicable to citizens of every race and color,* and regardless of any previous condition of servitude, *the full enjoyment of any of the accommodations,* advantages, facilities, or privileges in said section *enumerated, or by aiding or inciting such denial, shall,* for every such offense, *forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered in an action of debt, with full costs;* and shall also, for every such offense, be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than five hundred nor more than one thousand dollars, or shall be imprisoned not less than thirty days nor more than one year: *Provided,* That all persons may elect to sue for the penalty aforesaid or to proceed under their rights at common law and by State statutes; and having so elected to proceed in one mode or the other, their right to proceed in the other jurisdiction shall be barred. But this proviso shall not apply to criminal proceedings, either under this act or the criminal law of any State: *And provided further,* That a judgment for the penalty in favor of the party aggrieved, or a judgment upon an indictment, shall be a bar to either prosecution respectively. (Emphasis supplied.)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9607.

CHARLES E. WILLIAMS, *Petitioner,*

v.

HONORABLE OREN R. LEWIS, *United States District Judge*

ON PETITION FOR WRIT OF MANDAMUS OR WRIT IN THE NATURE OF MANDAMUS AND OTHER RELIEF

No. 9644.

CHARLES E. WILLIAMS, *Appellant,*

v.

HOWARD JOHNSON'S INC. OF WASHINGTON, *Appellee.*

PER CURIAM:

These not unrelated appeals were heard at the same time and will be here considered and dealt with together.

No. 9644.

Charles E. Williams (plaintiff) brought this action to recover damages because he, a Negro, was allegedly discriminatorily refused service in defendant's restaurant in Alexandria, Virginia. The original complaint in the instant case was filed November 4, 1960, in the United States Court for the District of Columbia and, on defendant's

motion, was stricken in its entirety. Pursuant to leave granted, the plaintiff then filed his first amended complaint. By order, the case was transferred to the United States District Court for the Eastern District of Virginia.

After extensive pretrial discovery by both parties, plaintiff filed a second amended complaint which was dismissed and, upon appeal, the dismissal was affirmed.[1] Plaintiff then filed a third amended complaint, the case came on for hearing on June 19, 1962, and the complaint was dismissed.[2] On appeal it appeared to this court that there had been a good faith misunderstanding of the parties as to the scope of the hearing before the District Court, and the judgment below was neither affirmed nor reversed but vacated and remanded for the purpose of affording a full hearing on the merits after proper notice.[3]

In remanding, this court, in an opinion by Chief Judge Sobeloff, said:

> "Irrespective, however, of the procedural dispute, the central question which the District Court decided, and which is the heart of this appeal, remains the same —whether the plaintiff has established that the refusal to serve him constituted 'state action' and not merely private conduct." (323 F. 2d at 105.)

---

[1] The subject matter involved herein was first heard and decided unfavorably to the plaintiff on January 7, 1959, by the District Court for the Eastern District of Virginia, before which an action was then pending. On appeal to this court that decision was affirmed, Williams v. Howard Johnson's Restaurant, 268 F. 2d 845 (4 Cir. 1959). The present action between the same parties, involving the same subject matter with slight variations, was instituted on November 4, 1960, in the District of Columbia.

[2] Williams v. Howard Johnson's, Inc., of Washington, 210 F. Supp. 295 (Cir. 1963).

[3] Williams v. Howard Johnson's, Inc. of Washington, 323 F. 2d 102 (4 Cir. 1963).

The opinion alludes to the evidence offered by the plaintiff and states the conclusion that such evidence is not clear enough, without a further showing, to compel the inference ["state action"] urged by the plaintiff. Clearly, in unambiguous language, the opinion directs:

> "* * * If the plaintiff has any additional evidence to offer bearing on the prosecutor's statements or activities, or if he has additional proof of a state action pertinent to the subject matter, he should be allowed to present it and the defendant should have an opportunity to meet it." (323 F. 2d at 107.)

Compliantly the District Court held a hearing on April 1, 1964, and, in a memorandum opinion filed on August 6, 1964, stated:

> "* * * All depositions, exhibits, interrogatories and admissions taken during the previous hearings, together with such additional depositions, interrogatories and admissions tendered by either party, were made a part of the record in this case. In addition the plaintiff called three witnesses—the Commonwealth's Attorney of Alexandria, Virginia, the Vice President of the defendant corporation, and the Executive Secretary of the Virginia Restaurant Association—and testified extensively himself.
>
> "Upon careful review of the record thus made, the Court again finds the 'denial of service was a voluntary act upon the part of the manager of the restaurant'—there was no state involvement in the conduct complained of, and the suit will be dismissed at the cost of the plaintiff."

Judgment of dismissal was entered and this appeal followed.

It would serve no useful purpose to restate the theories advanced by the plaintiff in the course of this litigation, the law, statutes and arguments upon which he has relied

to support his asserted cause of action. The position of this court and its determination of the legal principles here applicable clearly appear in prior decisions cited in footnotes 1 and 3 to which reference is again made. We have examined the record before the court below and we are in full accord with the finding and conclusion that there was no state involvement in the defendant's conduct of which the plaintiff complains. The action was properly dismissed and the judgment below will be affirmed.

Affirmed.

No. 9607.

Plaintiff, Williams, has filed a Petition for Writ of Mandamus or Writ in the Nature of Mandamus and Other Relief. The matters now presented thereby grow out of certain procedures in No. 9644.

The last hearing before the District Court in No. 9644 was held on April 1, 1964, but without waiting for a decision the plaintiff, under date of June 11, 1964, moved the court for leave to file another amended complaint upon what the District Court concluded were substantially the same grounds as the grounds asserted in previous complaints. The defendant appeared by counsel and interposed strenuous objections to further amendment, contending that all litigation, including the action for damages, must, at some point, be terminated.

The lower court filed a supplemental opinion in No. 9644, denying leave for further amendment, and said:

> "* * * This suit has three times been tried in this Court. It has twice been reviewed by the United States Court of Appeals for the Fourth Circuit and will probably be reviewed by that Court the third time. The same subject matter has been raised in a companion case in the District of Columbia and there remanded by the United States Court of Appeals for the District

of Columbia for interpretation of the meaning and application of the Virginia Code by the Virginia courts.''

The District Court determined that, under the recited circumstances, the plaintiff's conduct in attempting further amendment was an abuse of the court's processes and called for the visitation of sanctions upon the plaintiff who is, himself, an attorney. The court referred to our decision in *Gullo* v. *Hirst,* 332 F. 2d 178 (4 Cir. 1964), and certain statements therein, ordered the plaintiff to pay to the clerk, within seven days, the sum of $100.00 and directed that counsel fees of $100.00 be taxed against plaintiff for defendant's counsel as a part of the costs assessed against plaintiff.

Here, plaintiff contends that the evidence before the court would support an alternative theory of recovery based upon the common law and irrespective of the statutes upon which he had theretofore relied as the basis of his claim for damages and civil penalty; that, in asking leave to amend, after hearing, he was attempting to proceed according to Rule 15(b), F. R. Civ. P., to amend the pleadings to conform to the evidence.

In this context we think the motion to amend was properly denied.[4] However, although plaintiff's conduct of this litigation was such as to sorely try the patience of any court, plaintiff advances a reason for proceeding as he did. Actually, he took no arbitrary action over which the court had no control but merely sought the court's leave to amend.

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[4] Under Virginia law, a restaurant owner is not an innkeeper charged with a *common law* duty to serve everyone who applies. He may accept some customers and reject others on purely personal grounds. Alpaugh v. Wolverton, 184 Va. 943, 36 S. E. 2d 906, cited and discussed by this court in Williams v. Howard Johnson's Restaurant, 268 F. 2d 846 (4 Cir. 1962), and Williams v. Howard Johnson's Inc. of Washington, 323 F. 2d 102 (4 Cir. 1963). Plaintiff's asserted cause of action arose years before the 1964 enactment by Congress of laws materially affecting civil rights.

We think any doubt as to the plaintiff's sincerity and good faith in this respect should be resolved in his favor.

Therefore, after some deliberation and careful consideration, we conclude that the portion of the District Court's order of August 6, 1964, imposing sanctions and directing the taxing of an attorney fee as a part of the costs to be paid by plaintiff should be vacated and set aside. It will be so ordered.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~1196~~ 105

CHARLES E. WILLIAMS, *Petitioner*

v.

HOWARD JOHNSON'S, INC. OF WASHINGTON, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1126

CHARLES E. WILLIAMS, *Petitioner,*

v.

HOWARD JOHNSON'S, INC. OF WASHINGTON, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENT

OPINIONS REPORTED BELOW

The United States District Court for the Eastern District of Virginia, in its initial decision dismissing petitioner's complaint, entered an opinion reported at 210 F. Supp. 295 (E.D. Va. 1962). The appeal from this decision, neither affirming nor reversing but remanding the case, is reported at 323 F.2d 102 (4th Cir. 1963). Following remand, the case once again came before the United States Court of Appeals for the Fourth Circuit sitting en banc and is found

at 342 F.2d 727 (4th Cir. 1965). It is from this decision that the instant petition has been filed in this Court. Opinions involving the same petitioner and raising similar questions are reported at 268 F.2d 845 (4th Cir. 1959). And see *Williams* v. *Hot Shoppes, Inc.*, 293 F.2d 835 (D.C. Cir. 1961).

COUNTERSTATEMENT OF THE CASE

Petitioner, Charles E. Williams, instituted this action to recover damages and civil penalties because he, a Negro, was allegedly discriminatorily refused service in respondent's restaurant in Alexandria, Virginia on November 5, 1959. (R. II, 1-9). He contends that the refusal to accommodate him on grounds of race was in violation of 42 U.S.C. §§ 1981, 1983, 1985(3), 1988 and §§ 1 and 2 of the Civil Rights Act of 1875 (18 Stat. 335).

The original complaint was filed in the United States District Court for the District of Columbia and, on respondent's motion, was stricken in its entirety. The petitioner, through leave granted by the United States District Court for the District of Columbia, thereupon filed his first amended complaint.[1] (R. II, 42-45).

Following removal of the cause, extensive pretrial discovery was utilized by petitioner including the taking of depositions, the propounding of interrogatories and requests for admissions were filed and answered by the

[1] The subject matter involved herein was first heard and decided unfavorably to petitioner on January 7, 1959, by the United States District Court for the Eastern District of Virginia before which an action was then pending. This decision was affirmed by the United States Court of Appeals for the Fourth Circuit. *Williams* v. *Howard Johnson's Restaurant,* 268 F.2d 845 (4th Cir. 1959). The present action between the same parties, involving the same subject matter, with slight variations, was removed from the District of Columbia, upon motion of the respondent, to the United States District Court for the Eastern District of Virginia pursuant to the provisions of 28 U.S.C. § 1404(a) (1958). (R. II, 70)

respective parties. A pretrial conference for the purpose of formulating and simplifying the issues was held at the request of the petitioner. (R. II, 143).

After still further amendment to petitioner's complaint, the case came on for hearing before the United States District Court for the Eastern District of Virginia on June 19, 1962 and the complaint was dismissed.[2] (R. II, 201). On appeal, the United States Court of Appeals for the Fourth Circuit concluded that there had been a good faith misunderstanding between the parties as to the scope of the hearing before the District Court, and the judgment below was neither affirmed nor reversed but vacated and remanded for the purpose of affording a full hearing on the merits after proper notice.[3] In this connection, the Court of Appeals established with clarity and precision the circumscription of the evidence which the petitioner would be permitted to offer, if any he had on the remand. Thus, that Court said:

> If the plaintiff has any additional evidence to offer bearing on the prosecutor's statements or activities, or if he has additional proof of a State action *pertinent to the subject matter,* he should be allowed to present it and the defendant should have an opportunity to meet it. (Emphasis added.)

Williams v. *Howard Johnson's Inc. of Washington,* 323 F.2d at 107.

These, then, were the boundaries of the evidence to be allowed at the hearing on the remand. Additionally, the Court of Appeals delineated with specificity the pivotal question upon which the decision of this case was to turn.

---

[2] *Williams* v. *Howard Johnson's Inc. of Washington,* 210 F.Supp. 295 (E.D. Va. 1962).

[3] *Williams* v. *Howard Johnson's Inc. of Washington,* 323 F.2d 102 (4th Cir. 1963).

In this respect, the issue was fashioned by the Court of Appeals in the following manner:

> [T]he central question which the District Court decided, and which is the heart of this appeal, remains the same—whether the plaintiff has established that the refusal to serve him constituted 'state action,' and not merely private conduct.

323 F.2d at 105.

What was the heart of that appeal must necessarily become the heart of the hearing to be held before the District Court on the remand. This question, it is submitted, continues to be the sole issue of any consequence which has been presented by this litigation.

On April 1, 1964, this cause again came on for hearing before the District Court pursuant to the mandate of the Court of Appeals. A full and complete evidentiary hearing was accorded petitioner.[4] (R. I, 52, 53).

On August 6, 1964, the District Court filed its order, together with a memorandum opinion, dismissing petitioner's complaint and finding that the "denial of service was

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[4] At this juncture, it would seem appropriate to refer briefly to a chronology of the petitioner's pleadings. As previously noted, the original complaint was filed November 4, 1960, in the United States District Court for the District of Columbia. On respondent's motion, the complaint was stricken in its entirety. Pursuant to leave granted him, the petitioner filed his first amended complaint. After a change of venue was ordered transferring the case to the United States District Court for the Eastern District of Virginia and following the utilization of extensive pretrial discovery by both parties the petitioner amended his complaint for the second time. Then subsequent to (a) the District Court's judgment dismissing the amended complaint, (b) the appeal from such judgment to the Fourth Circuit and (c) the hearing on the remand, the petitioner undertook more than two months after the April 1, 1964, hearing to seek still another amendment to his complaint. In this latter attempt, the amendment was sought prior to the District Court's decision of the case. (R. I, 57).

a voluntary act upon the part of the manager of the restaurant." (R. I, 53).

Prior to this disposition, on June 11, 1964, petitioner sought an amendment to his complaint for the third time. (R. I, 45-51). The District Court concluded that the matters embraced within the proposed amended complaint were substantially the same grounds as those asserted in previous complaints filed by the petitioner. The respondent interposed strenuous objections to further amendment, contending that all litigation, including the action for damages, must, at some point, be terminated. The District Court concluded that, under these circumstances, the petitioner's conduct in attempting further amendment was an abuse of the Court's processes and called for the visitation of sanctions upon the petitioner who is, himself, an attorney. The District Court thereupon ordered the petitioner to pay to the Clerk of the Court the sum of $100 and directed that counsel fees of $100 be taxed against petitioner for respondent's counsel as a part of the costs assessed against the petitioner. (R. I, 54-59).

The petitioner noted an appeal from these decisions to the United States Court of Appeals for the Fourth Circuit. (R. I, 60). On February 4, 1965, the Court of Appeals affirmed the order dismissing petitioner's complaint holding, *inter alia,* that the evidence adduced on the remand failed to reveal that the Commonwealth of Virginia had, in any of its manifestations, been involved in the discriminatory exclusion of petitioner from respondent's restaurant on November 5, 1959. The Court did, however, vacate the District Court's order applying sanctions against petitioner, although the Court of Appeals noted that "plaintiff's conduct of this litigation was such as to sorely try the patience of any court . . . ." *Williams* v. *Lewis,* 342 F.2d at 730.

This petition for a writ of certiorari has followed.

QUESTIONS PRESENTED

In the context of this case, it is the opinion of the respondent that the sole question raised by the instant petition is that which was framed by the United States Court of Appeals for the Fourth Circuit in the first appeal of this case. There that Court said, and respondent respectfully adopts the statement, that:

> The fundamental question in this appeal is whether the record discloses such evidence of state participation and involvement in the discriminatory conduct as to require us to hold that the District Court was in error in determining the 'denial of service' was a voluntary act on the part of the manager of the restaurant.

Williams v. *Howard Johnson's Inc. of Washington*, 323 F.2d at 103, 104.

ARGUMENT

I

The Evidence of Record Fails to Disclose That the Exclusion of Petitioner From Respondent's Restaurant Was the Result of State Involvement

The fundamental question presented to this Court is whether the record discloses such evidence of state participation and involvement in the discriminatory conduct complained of as to require this Court to hold that the District Court, who twice heard this case, and the United States Court of Appeals for the Fourth Circuit, which twice passed upon the trial court's disposition, were in error in determining that the denial of service was a voluntary act on the part of the manager of the respondent's restaurant and therefore beyond the proscription of the Fourteenth Amendment and pertinent federal statutes.[5]

The mere establishing that the petitioner was denied service because he was a member of the Negro race does

[5] It must be noted that petitioner's asserted cause of action arose years before the 1964 enactment by Congress of laws materially affecting the civil rights of Negro citizens.

not satisfy the crucial test of state involvement. As this Court has repeatedly recognized, since its decision in the *Civil Rights Cases*, 109 U.S. 3 (1883), "that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1947). And see *United States* v. *Harris*, 106 U.S. 629 (1883); *United States* v. *Cruikshank*, 92 U.S. 542 (1876).

In accordance with these precedents, it cannot be controverted that private conduct abridging individual rights does not violate the equal protection clause "unless to some significant extent the State in any of its manifestations has been found to have become involved in it." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722 (1961); *Peterson* v. *Greenville*, 373 U.S. 244 (1963).

It was within this constitutional rubric that the petitioner had to prove that the Commonwealth of Virginia was necessarily involved in this discriminatory conduct rather than a finding that the question of racial exclusion had been left to the sphere of private choice. It is essential, therefore, that this Court must find that the record reveals that the alleged discriminatory practice was "under color of law" and therefore within the reach of the Federal Constitution. Recognition must be accorded, however, to the decisions of the Court of Appeals for the Fourth Circuit and the Court of Appeals for the District of Columbia Circuit which have found that petitioner's complaints are without constitutional merit. Moreover, these appellate decisions were reached by each circuit while sitting en banc.

The record will amply disclose that the sole evidence in both hearings before the trial court of unconstitutional discrimination grew out of the petitioner's own testimony. According to his version, the respondent's restaurant

manager answered "Yes" to his question as to whether the refusal to serve him was "on account of state law, custom or usage." (R. V, 5). But even that testimony is suspect at best, for when considered in the light of the deposition of the restaurant manager (who died prior to April 1, 1964) there is considerable doubt that the manager gave the answer so attributed to him by the petitioner.

Both on deposition and in the second hearing on the merits, the petitioner on cross-examination testified that the words "law," "custom," and "usage" were his technical words carefully chosen and incorporated in the question that he asked the restaurant manager. (R. V, 18). They were not the manager's words (R. V, 18) and the question was propounded by petitioner, who had long been a lawyer, who was a former professor of law, and who had made himself closely knowledgeable with the Civil Rights Acts and their language (R. V, 16-18). On the other hand, the restaurant manager was unversed in the ways of the law and the answers which he gave on deposition revealed the transparency of the petitioner's testimony in this regard.

On deposition the manager succinctly stated that he did not believe he would have been discharged from his position if he had served the petitioner (Pl. Ex. 50); that it was his judgment as manager that it was better not to serve Negroes whose presence in the restaurant would cause a disorder; that it was his judgment that it was better not to serve the petitioner in the restaurant nor any customer, the service of whom might jeopardize the restaurant's business or cause him to "lose an employee or two," in which event he usually requested the customer to leave (Pl. Ex. 50-51); that he was unaware of any "custom or a racial segregation law" in Virginia or of any requirement for the segregation of white and colored people in public places in Virginia (Pl. Ex. 61); that he had never heard from any source that the "State's Attorney was going to enforce racial segregation in the restaurants of Alexandria" (Pl.

Ex. 62, 63); and that his employer had neither discussed with him nor given him any orders whatsoever with respect to serving Negroes in that particular restaurant (Pl. Ex. 64). Therefore, contrary to the assertions of petitioner the manager thought that the exclusion of Negroes from that business establishment was necessary for the successful operation of his enterprise. It was, therefore, a voluntary act of a private citizen entirely divorced from the powers of the State.

The answers that this same witness gave to petitioner's interrogatories are to the same effect and render petitioner's assertions nothing but bald, unsubstantiated allegations. For example, the manager stated that he did not feel compelled to exclude Negro customers from the restaurant (R. II, 81-89); stated that he had received no instructions from his employer regarding the serving of Negroes (R. II, 81-89); categorically denied that he had advised the petitioner that he was not personally objectionable to him as a prospective patron (R. II, 82, 100); denied that he had advised the plaintiff that exclusion of Negroes from the restaurant was embarrassing (R. II, 82, 100); denied that he had advised the petitioner "in effect" that his reason for refusing to accommodate the petitioner was that Virginia law compelled exclusion of Negroes from restaurants (R. II, 82, 100); and denied having ever stated to petitioner that if he accommodated petitioner he would become subject to prosecution for violation of Virginia law (R. II, 82, 100).

It is significant to note that the petitioner in his earlier suit against the same respondent conceded, before the Fourth Circuit, that neither the Virginia segregated seating law nor any other similar statutory provision required the exclusion of Negroes from public restaurants. See *Williams* v. *Howard Johnson's Restaurant*, 268 F.2d 845, 847 (4th Cir. 1959). This concession was likewise duly noted by the District of Columbia Circuit in petitioner's

suit against a competitor of respondent. See *Williams* v. *Hot Shoppes, Inc.*, 293 F.2d 835, 839 (D.C. Cir. 1961).[6]

Furthermore, the Virginia Supreme Court of Appeals has declared it to be the law that a restauranteur, unlike the proprietor of an inn or hotel, may select his patrons as he desires, accepting some and rejecting others, even to the point of basing his personal choice on purely racial grounds, but that the law does not compel him to segregate customers according to race. See *Alpaugh* v. *Wolverton*, 184 Va. 943, 36 S.E.2d 906 (1946); *Randolph* v. *Commonwealth*, 202 Va. 661, 119 S.E.2d 817 (1961).[7]

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[6] Petitioner argues that State involvement must necessarily be found because the Commonwealth of Virginia regulates the conduct of restaurants within its jurisdiction. Further, that the corporate charter does not authorize discriminatory practices and therefore the voluntary act of respondent's manager was beyond its corporate powers. This argument, it is submitted, has never been adopted by this Court nor apparently by any other Court. A corporate entity can only operate through its agents. If these agents believe that it is necessary for the successful operation of their business to exclude Negroes, then at the very least it was an implied power under its corporate charter. Furthermore, the respondent was not incorporated under the laws of the Commonwealth of Virginia (R. II, 106) and a license to do business in that state certainly does not establish a meaningful nexus between the practice of discriminatory exclusion and significant state involvement.

[7] In his proposed third amended complaint, leave for filing of which was denied by the District Court and affirmed by the Fourth Circuit, petitioner complains of a deprivation of his common law rights. He says that a licensee or an invitee does not become a trespasser until ordered to leave and that the request to leave is essential to change his status (see petitioner's brief, pp. 3, 13, 19). But petitioner conveniently overlooks the fact that he acquiesced in the restaurant manager's refusal to serve him and voluntarily left the premises. The refusal to serve was the equivalent of a request to leave the restaurant and the voluntary departure of the petitioner therefrom would have made any request to leave a meaningless and useless act on the part of the restaurant manager. In

Additionally, the Attorney General of the Commonwealth of Virginia issued an opinion in 1960 in which he recognized that the so-called Virginia segregated seating law[8] did not apply to restaurants, lunch counters and cafeterias and therefore these establishments were, in his opinion, excluded from the ambit of that statute. Separation of the races was therefore left to the individual discretion of the proprietors of public restaurants. See *Williams* v. *Hot Shoppes, Inc.*, 293 F.2d 835, 848-51 (D.C. Cir. 1961) (App.).

Petitioner would also contend that state involvement may be predicated upon the alleged activities and pronouncements of the Commonwealth Attorney for the City of Alexandria, in that he supposedly regarded restaurants as within the Virginia segregation statutes and so advised those who made inquiries during 1959.

Contrary to this bare assertion, Mr. Earl Wagner, the Commonwealth Attorney for the City of Alexandria, was called as a witness by petitioner and testified at the hearing held on April 1, 1964. (R. V, 34). Demonstrative of the absence of state action, Mr. Wagner testified that it was his duty to enforce the criminal laws of the Commonwealth of Virginia (R. V, 36); that he had not attended any regular meetings to discuss any problems with relation to uniform law enforcement; that at any meetings of the Commonwealth attorneys that were held and which he attended, the question of "the enforcement" of racial segregation in restaurants was not discussed (R. V, 39); that he had never

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any event, under Virginia law, as hereinabove indicated, a restaurateur is not charged with the common law duty to serve everyone who applies. There being no cognizable legal duty to serve the petitioner there cannot be any deprivation of a common law right giving rise to damages. This being so, the petitioner's asserted claims founded upon a common law remedy must necessarily fall.

[8] Va. Code Annot. §§ 18.1-356 & 18.1-357 (Supp. 1960).

had any occasion or opportunity to have anything to do with the statute under discussion; that he had no occasion to prosecute anyone in connection with the so-called segregated seating law and that he had received no complaints of a violation thereof as it pertained to restaurants. (R. V, 42-52). Furthermore, this witness had no recollection of making any statements in which he was supposed to have stated that the segregated seating law applied to restaurants. (R. V, 41).

Thus, the evidence adduced at the trial completely lacked the probity necessary to find state involvement. There is no disclosure of the Commonwealth Attorney's intentions underlying any declaration of his views nor was there any exploration of the influence this declaration may have had in the instant case. Hardly does the instant case take on the image or assume the proportions of the "highly publicized announcements" made by public officials and which were found by this Court to constitute state action in *Lombard* v. *Louisiana*, 373 U.S. 267 (1963).[9]

Petitioner's case also failed to receive any support from his witness, Charles Mayne, a vice-president of respondent's corporation.

This witness testified that although respondent was a member of the National Restaurant Association, he never exercised or participated in any activity of that Association

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[9] The petitioner asserts that the failure of the Commonwealth Attorney to investigate his complaints of being racially excluded from restaurants constituted an official sanction of, or acquiescence in such discrimination. It would suffice to say that no statute, as petitioner has conceded, compels racial segregation in restaurants in the Commonwealth of Virginia and therefore the question of criminal prosecution does not arise. In this posture, the Commonwealth Attorney did not have an official duty to investigate since the segregated seating law of Virginia did not apply to restaurants and the determination by the proprietor to serve or not to serve Negroes was left to his discretion without any attendant criminal responsibility.

(R. V, 77); nor did either the Association or its pronouncements have any influence on the thinking of this witness or the policy of its restaurants. This witness did reveal in answer to written interrogatories, however, that neither he nor, as far as he could ascertain, had any officers, directors, or agents of the respondent entertained any fear that if they undertook to accommodate Negroes, including the petitioner, in the Alexandria restaurant during 1959 they would be subject to prosecution for violation of a Virginia racial seating law. (R. II, 98).

Respondent also believes that the testimony of Walter F. Whit, Executive Secretary of the Virginia Restaurant Association, should be considered as probative evidence of a failure of petitioner to prove that the exclusion of Negroes from restaurants was accomplished by state action. More specifically, this witness testified that the Association had never invited nor had any Commonwealth Attorney appeared at any meetings of the Association (R. V, 93); that the Association had never considered in any official or unofficial meeting the matter of restaurant desegregation during 1958, 1959 or 1960 (R. V, 99-100); and that the Association had no policy as to restaurant segregation, leaving such matters to the private determination of its individual members. (R. V, 100).

As this evidence of record readily reveals, the refusal to serve the petitioner resulted from the voluntary act of respondent's manager and was not commanded or induced by state action.

II

Sections 1 and 2 of the Civil Rights Act of 1875 Are Constitutionally Invalid

As determined by the Courts below and adhering to the precedents established by this Court, sections 1 and 2 of the Civil Rights Act of 1875, upon which the petitioner's position was based in part, were held to be unconstitutional. These statutory provisions were found unconstitutional as

applied to interstate racial discrimination in the *Civil Rights Cases.* 109 U.S. 3 (1883). Later, in *Butts* v. *Merchants' & Miners' Transp. Co.*, 230 U.S. 126 (1913), this Court held that these provisions could not be applied to penalize racial discrimination aboard interstate carriers even though the statute could, in that particular application, be upheld under the commerce power.

In *United States* v. *Raines*, 362 U.S. 17 (1960), this Court expressly reaffirmed the *Butts* decision. Therefore, even if respondent's conduct is assumed *arguendo* to embrace prohibitive state action, sections 1 and 2 of the Civil Rights Act have no present validity, and petitioner's claim under them was properly dismissed.[10]

III

The Belated Contention That the Transfer of This Cause From the District of Columbia to the Eastern District of Virginia Pursuant to the Provisions of 28 U.S.C. § 1404(a) Was Achieved By Misrepresentation and Fraud Is Baseless and Totally Lacking in Evidentiary Support

Petitioner, for the first time in this protracted litigation, has introduced the allegation that the removal of this case was brought about by misrepresentation and fraud. In making this bald assertion, petitioner fails to point to a scintilla of evidence within the confines of this record to support his proposition. Obviously, the apparent reason for this omission is that no support can be found in the record.

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[10] Even if the Civil Rights Act were valid and applicable to this situation, it would not support the petitioner's case since it covers only *inns*, public conveyances and places of amusement. (Emphasis added.) It has been held in Virginia, *Alpaugh* v. *Wolverton*, 184 Va. 943, 36 S.E.2d 906 (1946), that a restaurateur is not an inn-keeper charged with a common law duty to serve everyone who applies. In the absence of a statute, he may, therefore, discriminate on purely personal grounds in the selection of his clientele.

The petitioner, in this case as well as related cases involving the same parties, has availed himself of every procedure, mechanism, and process which the law provides in the vindication of rights and the redress of wrongs. He did not raise this question at any of the hearings below or on the appeals which followed.[11]

The record reveals with clarity the basis upon which a change of venue was sought and ordered. (R. II, 16-21, 70). The reasons advanced were, *inter alia,* that the Eastern District of Virginia was particularly suited for a determination of this case in that it had recently disposed of a similar suit involving the same parties and practically the same subject matter, which decision was affirmed by the Fourth Circuit. *Williams* v. *Howard Johnson's Restaurant,* 268 F.2d 846 (4th Cir. 1959). Moreover, the petitioner's complaint was predicated upon allegations that the discrimination alleged was founded on Virginia law, custom, and usage. Therefore, it was appropriate for a tribunal familiar with local law to sit on this case. Additionally,

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[11] Likewise, petitioner presents for the first time in this case the proposition that in the conduct of the trial below the District Court committed reversible error in failing to adhere to the Best Evidence Rule. It is sufficient that this issue was neither raised at trial nor presented to the Court of Appeals. Furthermore, questions of this calibre fail to achieve the stature required for the invocation of Supreme Court review. The failure to raise this issue in the myriad of proceedings below precludes effective appellate review.

In similar light, the issue framed by petitioner's brief respecting the quantum of proof necessary to establish a prima facie case would also seem to be beyond the pale of Supreme Court review. The burden of proof by a preponderance of the evidence was necessarily on the petitioner. The District Court twice dismissed his complaint and such a conclusion fashioned on a substantial evidentiary basis should not be set aside unless clearly erroneous. The limitations on appellate review are set forth in Fed. R. Civ. P. 52 (a). See *United States* v. *National Ass'n of Real Estate Bds.,* 339 U.S. 485, 495-96 (1950).

the act complained of arose out of that jurisdiction and the only nexus between the District of Columbia and this cause was the petitioner's residency in the District of Columbia.

IV

The Petitioner Was Afforded Procedural Due Process

The petitioner further complains that a supposed constitutional question has been raised in that he was allegedly denied the benefit of the Federal Rules of Civil Procedure. Among other claims, he asserts that Rule 15, respecting amendments to pleadings, was abridged.

It is remarkable to conceive that this claim can be made in the face of a record which reveals that the petitioner twice amended his complaint and on a third occasion attempted to amend his complaint after the District Court had held a hearing on the merits but prior to its decision. The District Court denied petitioner leave to file his proposed third amended complaint and this decision was affirmed by the Fourth Circuit while sitting en banc.

As Professor Moore in his authoritative treatise on the Federal Rules of Civil Procedure has stated:

> The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried; therefore an amendment after judgment is not permissible which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is evidence in the record—introduced as relevant to some other issue—which would support the amendment. This principal is sound, since it cannot be fairly said that there is an implied consent to try an issue where the parties do not squarely recognize it as an issue in the trial.

3 Moore, *Federal Practice* ¶15.13 (2) (2d ed. 1964).

In this law suit, petitioner has availed himself of every conceivable process to vindicate his claim. This case was

twice before the District Court and twice reviewed by the Court of Appeals for the Fourth Circuit. It is beyond peradventure that substantial, if not complete, procedural due process has been obtained by the petitioner and the decisions reached by the Courts below were eminently correct and should not be disturbed.

CONCLUSION

Wherefore, for the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 105

CHARLES E. WILLIAMS,

Petitioner,

v.

HOWARD JOHNSON'S, INC. OF WASHINGTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 58(2) of the Honorable Court, Charles E. Williams, petitioner, hereby makes application for a rehearing of the Petition for Certiorari, which was denied October 11, 1965, and, as grounds therefor, respectfully states as follows:

This case involves a state rule of evidence which always operates to preclude proof of the deprivation of a federal right in cases of non-obvious or indirect state involvement in private discrimination. The rule, one of de-

cision, raises a question upon which the lower courts are in disagreement, *viz.*, whether state statutes or state decisions should govern the trial of a civil case.

The precise question raised by the trial and appeal of the action is whether, in a non-diversity case, state rules may be applied to deny access to relevant evidence within the peculiar knowledge and control of the defendant, *i.e.*, evidence that would tend to establish a claim for recovery under a federal statute. The question is an important one of judicial administration and statutory construction involving the evidence and other procedural requirements of 42 U.S.C. § 1988.

I.

The question arises, primarily, because of the absence of uniform rules of evidence in the district courts. The want of such rules has been a matter of public concern for some time.[1] Accordingly, in response to the demonstrated need, Federal Rules of Evidence are now being drawn for the Court's consideration pursuant to the mandate of the Judicial Conference of the United States. In announcing the appointment of the Committee, the Chief Justice stated that "the task assigned to the Committee is of the greatest importance in improving the administration of justice in the United States courts."

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[1] Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Report on the Advisability and Feasibility of Developing Uniform Rules of Evidence for the United States District Courts, 30 F.R.D. 73 (1962); Ladd, Uniform Evidence Rules in the Federal Courts, 49 VA. L. REV. 692 (1963); Orfield, Uniform Federal Rules of Evidence, 67 DICK. L. REV. 381 (1963); Degnan, The Law of Federal Evidence Reform, 76 HARV. L. REV. 275 (1962); Sullivan, Evidence Rules in the Federal Courts: A Time for a Change, 38 TEX. L. REV. 452 (1960); Joiner, Uniform Rules of Evidence in the Federal Courts, 20 F.R.D. 429 (1957); Thompson, Rule 43(A) — A Decadent Decade, 34 CORN. L.Q. 238 (1948).

However, until the new rules are promulgated, the rules of evidence now applicable in the district courts will remain "in confusion." The Committee on Rules of Practice and Procedure of the Judicial Conference observed, for example, that the lower courts agree that state statutes should govern the trial of a civil case but differ entirely on the question of whether state decisions should be followed. Preliminary Report (note 1), 30 F.R.D. at 83-84.

But in the instant case, state decisions rather than the relevant state statutes were applied. The defendant, for example, failed to submit testimony on its behalf and rested entirely on the testimony (elicited by plaintiff during discovery) of an "interested" witness who was legally incapable of binding the corporation and who was dead at the time of the trial. A state statute authorizes the court to disregard the defense in such a case. VA. CODE ANN. § 8-290 (1950). And if the "interested" witness were capable of binding the corporation, state law would require corroboration of his testimony. VA. CODE ANN. § 8-286 (1950) (1964 Cum. Supp.).[2]

However, the foregoing statutes were ignored. And state decisions (protecting the defendant's nondisclosure of pertinent information from an unfavorable inference) were allowed to control the case.[3] For all practical purposes, the decisions create conclusive presumptions that good personal reasons always exist for the restaurant

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[2] Note, Corroboration in Virginia under Section 8-286, 39 VA. L. REV. 395 (1953).

[3] *Alpaugh* (Pet., 8) holds that a restaurant keeper is not obliged to disclose the reason for his arbitrary discrimination against prospective customers. And *Randolph* (Pet., 8) establishes nonliability when his discrimination is based solely on race or color. Even though this Court vacated the *Randolph* judgment, the courts below, nevertheless, applied the decisions in the instant case to protect nondisclosure of information that might probably show indirect state involvement in the admitted discrimination.

keeper's arbitrary discrimination against customers irrespective of the particular circumstances. Therefore, proof that his discrimination was induced or sanctioned by the state or its functionaries is always precluded.

These rules of decision, if applied in a non-diversity case brought under 28 U.S.C. § 1343 would short-circuit and frustrate the purpose and effect of the federal discovery rules and the civil rights statutes in every case of non-obvious officially sanctioned private discrimination.

The Court should settle the questions of: (1) whether the relevant state rules of evidence embodied in the statutes or decisions should control a non-diversity case; (2) whether, under any circumstances, state rules may be substituted for the more liberal federal discovery rules in such a case; (3) whether Rule 43(a), FED. R. CIV. P., which is slanted toward admissibility rather than exclusion of evidence, permits examination of a corporate officer at pretrial and trial in order to determine whether the corporation's racial discrimination at only a few of its facilities in a particular area was induced or sanctioned by the state or state agents; and (4) whether the Rules of Decision Act, ordinarily applicable in diversity cases, applies to civil actions invoking the civil rights remedy or whether 42 U.S.C. § 1988 is exclusive in such cases.

Such a ruling would immediately resolve an embarrassing difference of opinion among the lower courts. (The conflicting decisions are discussed in 30 F.R.D. at 83-84.) Such a ruling would be a guide to the Committee drafting the new rules. And it would serve the public interest as an authoritative construction of 42 U.S.C. § 1988 applicable in civil cases.

II.

It is believed that 42 U.S.C. § 1988 authorizes a special rule of practice allocating the burden of proof in suits instituted under 28 U.S.C. § 1343 and alleging private discrimination under color of law. Such a rule of practice is essential if the viability of the rights of action created by 42 U.S.C. §§ 1983; 1985(3) is to be maintained in practice as well as in theory. If there is a federal right to be free from officially sanctioned private discrimination, then there must be a right to the available evidence to establish the claim for violation thereof irrespective of any state rule to the contrary.[4]

The essential element of racial discrimination is a mental process of the alleged discriminator. Hence, the precise reason for the discrimination is always within his peculiar knowledge and control and, thus, requires the alleged discrimination to be proved by circumstantial or indirect evidence, *i.e.*, the inferences to be drawn from negative factors.[5] Compare *Katzenbach v. McClung*, 379 U.S. 295, 304-305, where "the absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food" was not deemed "crucial."

It was the impossibility of proof, rather than absence of substantive remedy, that formed the basis of the general belief that one aggrieved by indirect state sanctioned private discrimination was without a practical remedy in the federal courts. This apparent void in the civil rights acts was felt to justify the lunch counter "sit-ins" and led to the enactment of Title II of the Civil Rights Act of 1964. But the impossibility of proof in such cases, nevertheless,

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[4] The Committee on Rules of Practice and Procedure concluded that "application of state law of evidence" is not required "as long as there are rules of court covering evidence." 30 F.R.D. at 118.

[5] See Hudson, "Peculiar Knowledge" and the Burden of Proof, 1 SOL. Q. 60 (1962).

remains. The decisions validating Title II, for example, did not dispose of the question of burden and sufficiency of proof of racial discrimination since such discrimination was conceded in those cases. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, and *Katzenbach v. McClung*, 379 U.S. 295.

A fair allocation of the burden of proof in any case where the evidence to establish an essential fact is within the exclusive knowledge and control of the adverse party is essential to good judicial administration and abiding public confidence in the judicial process.[6] Such an allocation has been made in other areas.

In tax litigation, for example, the burden of proof has been allocated by statute and court rule for particular purposes. The taxpayer, generally, must establish his claim by a preponderance of evidence. But, in some instances, clear and convincing proof is required. In other instances, the burden is on the Government to prove a host of negative factors. Forman, The Burden of Proof, 39 TAXES 737 (1961).

In the antitrust field, the statute requires the aggrieved purchaser to make out a prima facie case of price discrimination. And, in so doing, the burden of unwieldy proliferation of evidence has been lifted by the Court's per se rule on illegal restraints of trade. The seller is then required to meet the prima facie case by an affirmative showing. 15 U.S.C.A. §§ 13(b), 16(a).

By contrast, a customer aggrieved by the non-obvious officially sanctioned racial discrimination in privately operated public restaurants experiences a sense of helplessness when access to both direct and indirect proof of the fact is denied him solely on the basis of a state evidence rule.

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[6] Note, American Legal Dilemma — Proof of Discrimination, 17 U. CHI. L. REV. 107 (1949); Stumbo, Presumptions — A View at Chaos, 3 WASHBURN L. J. 182 (1964).

III.

The Court should also settle the question of whether the conclusion that the evidence fails to support recovery on the theory of action taken under color of law necessarily precludes recovery where the proof establishes the elements of an actionable wrong under state statutes.

The plain language of 42 U.S.C. § 1988 authorizes an adjudication on state grounds if the civil rights remedy is unsuitable. And it has been held that the statute "adopt[s] state law of the several states as federal law" and thus "enlarge[s] the civil right remedy by authorizing resort to state law." (Pet., 19.)

In the instant case, state law, for example, prohibits a seller of goods or services from doing any advertising in newspapers which tends, either directly or indirectly, to be deceptive or misleading. VA. CODE ANN. § 18.1-131 (1950). And the right of action for injury arising out of violation of the statutory duty is preserved. VA. CODE ANN. § 8-652 (1950). The undisputed evidence (Pet., 10) appears to support recovery on that ground. The complaint demanded judgment for damages under the federal statutes "and such other relief as the Court may deem proper."

This Court has stated that a right of action created by state law is a property right (Pet., 14n), and that federal courts within the state are state courts for certain purposes. *Tennessee v. Davis*, 100 U.S. 257, 271-272. Consequently, once a federal court has jurisdiction, even though federal questions are properly presented by the record, the court is free to decide the case on "local or state questions only." *Siler v. L. & N. R. Co.*, 213 U.S. 175, 191.

IV.

The questions thus presented are not academic or episodic. They are questions of special importance because of the national scope of 42 U.S.C. § 1988; the public interest in better securing the federal rights of due process and equal protection of law; and the public interest in having uniform rules of evidence for the federal courts.

Consequently, the denial of certiorari is likely to be taken as a condonation by the Court of the opinion that the civil rights acts do not apply in cases of non-obvious, indirect, state-sanctioned private discrimination.

"The Virginia Supreme Court of Appeals * * * flatly declared * * * that the law does not compel [the restaurant keeper] to segregate customers according to race." 323 F.2d at 106. This Court rejected that proposition by vacating the *Randolph* judgment and remanding the case for "reconsideration." 374 U.S. 97. But *Randolph*, nevertheless, was given controlling effect in the disposition of the instant action. Therefore, the denial of certiorari is likely to be regarded as an approval by the Court of the *Randolph* rule in civil cases and the rejection of it in criminal prosecutions only. See the orders at 374 U.S. 98, 99, 100, and 378 U.S. 550, 552.

V.

The following affidavit has been filed in support of this petition:

"District of Columbia, to-wit:

"I, Charles E. Williams, the undersigned, depose and state under oath: That I am the petitioner named in the above-styled cause; that the Petition for Rehearing of the Petition for a Writ of Certiorari is presented to the Court in good faith and not for the purpose of delay; and that said

Petition for Rehearing is restricted to substantial grounds available to petitioner although not previously presented.

"/s/ Charles E. Williams

"Subscribed and sworn to before me this First day of November, 1965.

"/s/ Leonard M. Supchak
Notary Public, D. C.

"My Commission Expires February 28, 1969."

CONCLUSION

For the foregoing reasons, the petitioner prays the Court to grant the writ.

Respectfully submitted,

CHARLES E. WILLIAMS
Petitioner, Pro Se
1329 Shepherd Street, N. W.
Washington, D. C. 20011

November 4, 1965

END